GENERAL AVERAGE.

"QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS."

THE occasion for this article is a recent decision of the Supreme Court,[1] that damage caused by water poured into the hold of a vessel in port to extinguish a fire, and by scuttling the ship for the same purpose, when done by the fire-engine companies of the municipality, is not a subject for a general average adjustment, provided they came without the master's initiative, and were not within his control, and a similar decision made in Massachusetts in 1883.[2]

These decisions I purpose to review.

The decisions upon the precise point are few, and entirely irreconcilable. In the Massachusetts case, Mr. Justice Field states with great clearness the view taken by the court. Mr. Justice Gray, giving the opinion of the majority court in Ralli *v.* Troup, approves this decision, and quotes largely from the opinion of Field, J. His own opinion consists of a very learned and thorough exposition of the decisions, which will always be valuable, though, upon the particular point in judgment, I cannot find in the decisions support for his conclusion.

On the other hand, the decision in the District Court by Judge Addison Brown,[3] and the minority opinion in the Supreme Court, given by Mr. Justice Brown for himself and Mr. Justice Harlan, should be referred to for able arguments on the other side. Other cases which I shall mention support the minority opinion.

In this divergence of opinion, my comments must be regarded as argumentative and not dogmatic; and in the paucity of decisions, the underlying principle of general average must be considered.

The general summing up at the end of the majority opinion in Ralli *v.* Troup is too long for quotation in full. Stated briefly, the first proposition is, that to constitute a general average loss there must be a voluntary sacrifice of part of a maritime adventure, for

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1 Ralli *v.* Troup, 157 U. S. 386.

2 Wamsutta Mills *v.* Old Colony Steamboat Company, 137 Mass. 471.

3 37 Fed. Rep. 888.

the purpose and with the effect of saving the other parts from a peril impending over the whole.

Thus far I agree, and the case in judgment is within the definition, which contains, in my opinion, not only the truth, but the whole truth.

The summary then goes on to limit the rule. It says that the sacrifice must be with the sole object of saving the other parts of the adventure; that it must be made by the will and act of its owner, or of the master of the ship or other person intrusted with control of the common adventure; that port authorities being strangers to the adventure, and their right and duty being derived from the municipal law, and not from the law of the sea, and since in their action they are not subject to be controlled by the owners of the adventure, their acts are not general average acts.

One sentence I quote in full. Speaking of the port authorities, the opinion says: "Their sole office and paramount duty, and it must be presumed their motive and purpose in destroying ship or cargo, in order to put out a fire, are not to save the rest of a single maritime adventure, or to benefit private individuals engaged in that adventure; but to preserve the shipping and property in the port for the benefit of the public." This last statement I will consider now, as I shall not refer to it again.

The learned judge appears to be likening the putting out of a fire on a ship to the destruction of a house which is not on fire to stop the spread of a conflagration, which by the common law is not to be paid for; though statutes in some States have, I believe, remedied this oversight. That was not at all the case before the court. The fact was that the fire companies poured water into a ship on fire, and afterwards scuttled her. The intent of any one, company or individual, in trying to put out a fire is to put out that fire; and it is as much the duty of a municipal fire company to put out a fire in a house or ship, when other property is not endangered as when it is. I shall assume, without furthur argument, that the intent of the fire companies was to put out this fire, and therefore necessarily their intent, if they had any besides an intent to do their duty, was to benefit whomsoever they might benefit thereby. The proposition that the sole intent must be to benefit the common adventure, I shall refer to presently.

My position is that the doctrine is stated in the first sentence above quoted, that there should be a voluntary and successful sacrifice of part of a maritime adventure with intent to save the

other parts,[1] and that the numerous subsequent limitations are not sustainable.

The law of general average was originally called by the Greeks and Romans the law of jettison, from the simplest instance of its exercise, — that of throwing goods overboard to lighten the ship; and the rule was laid down, that what is given for the benefit of all should be made good by the contribution of all.

This law as now administered does not depend upon evidence of the extent of any custom, nor upon any implied contract between the several persons interested in the adventure,[2] though a fictitious contract has been imagined by some English judges, in order, apparently, to give the courts of common law jurisdiction after they had crippled the Admiralty, where the question properly belongs. Their position was that the Admiralty could not deal with contract, as such, which, indeed, was formerly the law of England. "It is, indeed, a sight," says Maclachlan, "to witness the successors of the famous Twelve [meaning the judges who prohibited suits in the Admiralty] contending for the customs of the sea as the basis of general average, and at the same time the successor of the unfortunate judge of the Admiralty Court refusing jurisdiction over general average, because it rested on no such basis."[3]

The point is not of much consequence, because the imagined contract is confessedly a fiction, and those who use that expression merely mean that persons may be supposed to contract to do what the law requires of them.

The law of general average is an equitable rule analogous to that of contribution between persons subject to a common burden, but bound by no contract *inter se*, and is imposed by law upon the parties.

In the leading case, concerning contribution between co-sureties,[4] Lord Chief Baron Eyre, delivering the opinion of the court, said, "As in the case of average of cargo in a court of law, *qui sentit commodum sentire debet et onus*. . . . In questions of average there is no contract or privity in ordinary cases, but it is the result of general justice, from the equality of burden and benefit."

In another report of the case[5] the language given is: "In the

[1] Voluntarily means purposely.

[2] See Crooks *v.* Allan, 5 Q. B. D. 38; Burton *v.* English, 12 Q. B. D. 218, 220; Page *v.* Libby, 14 Allen, 261, 267; Marwick *v.* Rogers, 163 Mass. 261, 267.

[3] Law of Merchant Shipping, 4th ed. p. 690, note.

[4] Dering *v.* Earl Winchelsea, 1 Cox, 318, 322.

[5] 2 B. & P. 270, 274.

case of average, there is no contract express or implied in an ordinary sense. This shows that contribution is founded on equality, and established by the law of all nations."

General average is applied in all maritime countries to many cases besides jettison; for instance, to the sacrifice of mast or rigging, extraordinary expenses in a port of necessity, and many others.

When water was poured into the hold of a vessel to put out a fire, or the ship was scuttled for that purpose, adjusters in England, until the year 1873, refused to consider damage to goods by water, or to the vessel by cutting holes in the deck or hull, as a subject for contribution. It is now, however, held in all European countries, and in the United States and England, to come within the principle. This was established by the courts of the United States in 1855 and 1856, and in England in 1873.

Among extraordinary expenses must be reckoned money paid for salvage. Such payment, whether voluntary or by order of the court, is a general average charge, and is properly so declared on in an action.[1] This does not arise from any contract between the parties to the adventure, nor because the master is the agent of all parties, nor is the expense always voluntarily incurred.

In a case of derelict where contribution in general average was claimed, one defence was that the expense was not incurred voluntarily, meaning that no one connected with the adventure had ordered it, but judgment was given for the claim.[2] So of military salvage decreed and paid for a recapture by the navy.[3] No one can doubt that naval officers are as much servants of the government as fire companies are servants of a municipality.

In one case, the House of Lords held that money paid by the master under a contract, which he had made with a salvor, was not binding on the owner of the cargo as a contract, but that a reasonable share of the salvage money might be recovered by the shipowner from the cargo-owner, and that the determination of the amount should have been left to the jury.[4]

These decisions show that a general average sacrifice need not

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1 Briggs *v.* Traders' Association, 13 Q. B. 167; Akerblom *v.* Price, 7 Q. B. D. 129; Ocean S. S. Co. *v.* Anderson, 13 Q. B. D. 651.

2 Briggs *v.* Traders' Association, 13 Q. B. 167.

3 The Racehorse, 3 Rob. 101.

4 Anderson *v.* Ocean S. S. Co., 10 App. Cas. 107.

be ordered by any one connected with the adventure; and that if so ordered, it is not necessarily binding on an owner of cargo.

Under this doctrine of equity and equality, would any one imagine that my right of contribution for my goods successfully jettisoned for the general safety, should depend upon whether the order for the jettison came from the commander of the ship? The alternative would be that I should recover the whole value of my goods from the passenger effecting the jettison, or from the owners of the ship, if it was done by the crew; but Mouse's case, which I shall refer to presently, closes this alternative. I shall try to prove that the authorities, so far as any are at all analogous to the case under consideration, do not sanction such a narrow doctrine as is now announced.

It is true that the master is, by necessity, in times of peril, the agent of all persons interested; his power, responsibility, and duty as such agent are much enlarged upon in many cases; but they were cases where he had ordered the sacrifice, and where the question was whether the loss should fall upon him and his owners, or be brought into contribution. In almost all cases, the master does order the act.

In ordering a jettison, however, the master does not act as agent of the owner of the goods cast overboard, but as commander of the ship.

In the ROLLS OF OLERON and the LAWS OF WISBY, it is adjudged, that if merchants are on board the ship, the master should consult them before throwing over their goods; but they further say that if the merchants refuse their consent, he may none the less make the jettison lawfully, if he and a certain proportion of his crew will on reaching land make oath that it was necessary for the common safety, which is the quaint mediæval way of saying if the necessity existed.[1]

This example teaches that the master does not act as agent of the owner of the goods jettisoned (for the principal was present and refused his consent), but as a man in authority, like the fire companies, and that a voluntary sacrifice of merchants' goods does not mean a willing one on their part.

An early English case of jettison is Mouse's case.[2] There a barge, used as a ferry-boat between Gravesend and London, met

[1] Rolls of Oleron, Pardessus, vol. i. p. 328; Laws of Wisby, Pardessus, vol. i. p. 490; Black Book of the Admiralty, vol. iv. p. 276.

[2] 12 Rep. 63.

with a storm, and goods were ejected, "some by one passenger, and some by another," and the owner of certain goods so jettisoned brought an action against the passenger who threw them over; and the court held that if the jettison was necessary for the safety of the passengers, it was lawful; and the jury having found the necessity, the defendant had judgment. The master is not mentioned in connection with the jettison. Mr. Carver's comment on this case is: "In Mouse's case, a jettison by a passenger for the general safety was held to be lawful; and though nothing was said there about general average contribution, there can be little doubt that if the jettison for the general safety has been lawful, the rule of contribution applies, however it was made."[1] Professor Parsons makes a similar comment.[2] These remarks of Mr. Carver follow this statement in the same paragraph: "The sacrifice ought, generally speaking, to be made under the directions or with the authority of the master or other person in command of the ship. But that does not appear to be an essential; the real questions are, Was a sacrifice necessary for the general safety? and Were the measures taken reasonably prudent in view of that necessity? It is conceivable that a sacrifice might fulfil these conditions, although made contrary to the will of the master." In this he adduces and approves the opinion of Benecke.[3] In a note he says: "But of. Macl., p. 664; Phillips Ins., § 1280; Jacobsen, Sea Laws, bk. iv., ch. 2, p. 345; Authority of Crew, The Nimrod, Ware, 14."

I find nothing in the latest edition of Maclaughlan, nor in Jacobsen, opposed to Carver and Benecke. Phillips, § 1280, simply makes a short quotation from Judge Ware's decision in The Nimrod. In that case, the question was whether one of the crew, who had jettisoned certain goods while the master was below, and whose act the master promptly disapproved, had thereby forfeited his wages; and the decision was that he had not. The learned judge says, in substance, that it is for the master to give the orders for the sacrifice, and not for the crew to act without his orders. "What they might be justified in doing in extreme cases, such as were put at the argument, it is unnecessary to decide until those cases occur."

It will be noticed that this was a question of the proper conduct of a seaman, and not of general average. The decision was that

1 Carriage by Sea, 374.

2 Shipping and Admiralty, 339.

3 On Insurance, p. 172.

the sacrifice was not wanton, and therefore there should be no forfeiture of wages. In other words, there was a reasonable ground for the jettison; and if so, it was, in my opinion, a case for contribution, if that had been the question before the court.

There was a decision in the District Court for Massachusetts that a necessary jettison of certain rolls of leather by seamen without the orders of the master, and disapproved by him, gave occasion for a general average adjustment.[1] The able and learned counsel who had brought his libel against the owners of the ship, for the whole damage, was not satisfied with the decision. I would suggest that he did not give sufficient credit to the fact of necessity, which was evidence that without the jettison his clients would have lost their goods entirely, instead of only their proportionate share. A French commentator puts jettison by the crew, without the master's order, as general average, if the necessity existed; and he thinks that the German Code, which requires, as he understands it, the master's order, to be too restrictive (Valroger, Droit Maritime, vol. v., p. 35, No. 2006). It is pertinent to observe that Mr. Justice Brown, granting that the master is to give the order, considers that any person in lawful command is the equivalent of the master. I agree to this; but do not admit the major premise. The German Code, art. 702, says: "All damage done to ship or cargo or both by the master or by his orders, with intent to save both from a common danger, as also the consequential damages resulting therefrom, and the expenses incurred for the same purpose, are general average." In no other code, or elsewhere, that I know of, is the master mentioned in the definition, though it is assumed that he usually orders the sacrifice.

Lord Tenterden cites Mouse's case in his description of "general average" as one of a lawful jettison, from which it may be fairly inferred, I think, that he would have agreed with Carver and Parsons that it was a case for contribution.

In an English case tried in 1811,[2] it was proved that an English vessel had been captured by French privateers, who took out the captain and crew, except the mate and two of her men, and put on board her a French prize-master and part of the privateer's crew, and shaped their course for Marseilles; and a storm arising,

1 The Adriatic, *ex relatione* J. Lathrop, now Lathrop, J., of the Supreme Court of Massachusetts, who is the counsel referred to. I made the decision, but had forgotten it.

2 Price *v.* Noble, 4 Taunt. 123.

they threw overboard, for the necessary preservation of the ship, and with the assistance and approbation of the mate, whom they called to their aid in navigating the vessel, the guns, two anchors, two cables, and other stores from the middle deck. On the following day, the ship was retaken by the mate, with the assistance of some Italians in the Frenchman's service, and was carried into Gibraltar.

The owners of the ship succeeded in an action for contribution against the owners of the cargo.

This case is referred to in Ralli *v.* Troup as if the fact that the mate ordered the jettison supported the contention that the master, or in his absence the mate, must be the actor.

It is plain, however, that the mate was not acting as the agent of the owners of the ship and of the shippers, but as the prisoner and servant of the captors, who themselves conferred the benefit.

The defendant's counsel in that case argued that general average arose from the act of the master and mariners, which he truly remarked was not the case in this instance. The court overruled the objection.

It is clear from an examination of the opinion of Mansfield, C. J., that the action of the mate is referred to only as proving the necessity of the jettison. It was so understood by Lord Tenterden. In the fifth edition of Abbott on Shipping, the last edition for which the author was responsible, the case is stated thus (the italics in text and note are by the author): "And it has been decided in an English court in the case of a ship captured and afterwards recaptured that the shippers of goods were liable to contribution for stores *necessarily* thrown overboard during a storm while she was in the hands of an enemy." The note to this case is as follows: "Price *v.* Noble, 4 Taunt. 123. In this case the *necessity of the jettison was proved* by the testimony of the mate, who had not been taken out of the ship, and who had effected the recapture."[1]

In some editions later than the fifth, this note is omitted, and the words "with the advice of the mate" are inserted in the text in speaking of the jettison. I suppose that the change was made by Shee, J. These changes seem to show that some editors may

[1] In the preface to the thirteenth edition, the learned editors say that they have endeavored "to reinstate (except so far as it is obviously obsolete) the fifth edition, which was the last for which Lord Tenterden was responsible." This passage they have reinstated. See 5th ed. p. 348; 13th ed. p. 642.

have attributed more importance to the mate's advice than did the author; but the decision was rightly understood by Lord Tenterden. The true text and note are restored in the thirteenth edition.

In Parsons the note is this, "The owners of cargo are liable to contribution for ship's stores necessarily thrown overboard after a vessel is captured and when she is in the hands of the captors. Price *v.* Noble, 4 Taunt. 123."[1]

As I have already said, the case of injury by water used to put out a fire, or to the ship by cutting holes in her deck or hull for that purpose, was not brought before the courts until 1855. In that year, Nimick *v.* Holmes[2] was decided. In that case, Lowrie, J., delivering the opinion, says, "It makes no difference how the water is applied, by the aid of *fire-engines* on the land, or in the form of steam, or by scuttling the vessel. *All three modes were tried in this case before the success was complete.*" I have italicised the statement that fire-engines were used, because this fact is overlooked in both the cases I am reviewing.

In the first English case[3] (1873) which changed the practice of adjusters in England,[4] this passage is quoted with approval by Quain, J., delivering the considered opinion of the court, who could find no English case upon the subject. It is true that the opinion in that case was not a decision, because the parties had agreed that average, if any, should be adjusted according to British custom, and it appeared that British adjusters treated such a loss as a particular average.

In a later case[5] the stipulation was: "All questions of general average to be settled according to the custom of London Underwriters at Lloyd's," and a jury found that there was no custom of underwriters to treat such a loss as a particular average, and a judgment for general average was recovered.

Nimick *v.* Holmes is cited in several other English cases, with approval, though without any quotation from the opinion.[6]

The rule being established and fully recognized that in general the damage by water is to be compensated for, I shall now refer

[1] Parsons on Shipping and Admiralty, 352, note.

[2] 25 Penn St. 366, 373.

[3] Stewart *v.* W. I. and Pac. S. S. Co., L. R. 8 Q. B. 88, 93.

[4] 2 Asp. Mar. Cases, N. S. 32, note a.

[5] Achard *v.* Ring, 2 Asp. Mar. Cases, N. S. 422.

[6] See Pirie *v.* Middle Dock Co., 4 Asp. Mar. Cases, N. S. 388, 392; White Cross Wire Co. *v.* Savill, 2 Q. B. D. 653, 660.

only to those cases in which fire companies have done part of the work of putting out the fire.

The next case of the use of fire-engines after Nimick *v.* Holmes, is Nelson *v.* Belmont,[1] tried in 1856. It was taken for granted that the case was one of general average, though the fire companies assisted ; the dispute was whether the defendant's specie was, under the peculiar circumstances, liable to contribute.

The same right to contribution was not disputed by Admiralty lawyers of experience in Gregory *v.* Orrall. [2] In that case, the fire companies did part of the work and made no charge ; the rest was by the crew and by salvors. That salvage should be brought into contribution was taken for granted; no one intimated that the action of the fire companies had any bearing on the question.

The like rule was followed in The Roanoke.[3] In that case, the District Judge notices that the master procured the action of the companies by sounding the alarm. He does this to avoid a discussion of the Massachusetts case which finds that the companies came without being summoned. It by no means appears that his own opinion turned on that point. On appeal this decision was affirmed by the Court of Appeals; and the opinion takes no notice of the fact that the master caused the alarm to be sounded.

A like decision was made in The Rapid Transit.[4]

That the master or seamen invited the aid of the fire companies was proved or may be fairly inferred in the cases of Nelson *v.* Belmont, Gregory *v.* Orrall, and The Roanoke. In Gregory *v.* Orrall, the master and mate were both on shore, and the fire companies were summoned by some one; I assume that it was by the crew. Such summons is neither proved nor to be inferred in Nimick *v.* Holmes, or The Rapid Transit ; and what is more important, no argument or question was made or suggested on this point in any case except in The Roanoke, where, as I have explained, it was used to meet a citation of the Massachusetts case.

I ought to add that neither in the Massachusetts case nor any other has the mere fact of who spoke first been thought to raise a distinction upon which to hang a great injustice. No court ever could hold that. The distinction taken in the Massachusetts case and in Ralli *v.* Troup is that the municipal companies took control of the operations. It is intimated in the former case that the mas-

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[1] 3 Duer, 310; 21 N. Y. 36.
[2] 8 Fed. Rep 287.
[3] 46 Fed. Rep. 297 ; 59 Fed. Rep. 161.
[4] 52 Fed. Rep. 320.

ter might be supposed to direct the proceedings when only the single ship was in danger, but not when adjoining property was to be protected. In the Ralli case the municipal companies are said to act in all cases by virtue of their public authority. If this is sound, and I think it is, every case in which fire companies have been employed and general average adjudged is an authority in favor of my contention.

I cannot close this discussion, long as it has been, without considering two points which are relied on in the decisions here reviewed.

Mr. Justice Field, in a passage of his opinion which is quoted with approval in the majority opinion in Ralli *v.* Troup, says: "The distinction between a fire put out by the authority of the master, or other person in command, and one put out by public authority is, we think, sound. When a ship has been brought to a wharf, so far as it had become subject to municipal control, if that control is exercised, we think that it stands no differently from any other property within the municipality over which the same control has been exercised; and that the general maritime law does not cover the reciprocal right and objections of the parties to the maritime adventure so far as the consequences of this control are concerned, but that they are to be determined by municipal law." By municipal law is here meant the law of things on land. I must confess my inability to follow this reasoning. That because there is no general average for damage to a house, there should be none for damage to a ship, if both are damaged by fire companies, does not seem to follow, any more than the converse, — that if a fire in a warehouse were extinguished by the fire-pumps of a ship, there should be a contribution.

In the opinion of the Supreme Court a new point is introduced: That the sole object of the sacrifice must be the common good of the particular adventure; and therefore, if the fire companies acted, or may be supposed to have acted, in part with a view to saving the spread of the fire to other property, there can be no claim for general average.

If so, owners must be careful to instruct their masters not to indulge in any altruistic feelings in such cases.

No point is better settled in the law, both civil and criminal, than that if the legal character of an act depends upon the motive with which it was done, and that motive is found to have existed, the case is made out, no matter how many other motives may

have moved the actor in the same direction. I have already shown that the motive of a fire company in pouring water upon a fire is to put out that fire.

The law of general average does not, in my opinion, differ in this respect from the law applied in various ways to other subjects. The three cases cited by the court to establish a difference do not appear to have that effect. Two of them decide that strangers cannot be forced to contribute, as, for instance, if by cutting a cable the master saves his own ship, and thereby benefits another ship, he cannot claim contribution from the latter because it has no connection with the adventure of ship No. 1.[1]

It would seem to follow that if strangers are not to contribute for a benefit conferred on them, the intent to benefit them must be wholly immaterial. These two cases seem to favor my view, if they have any bearing at all upon the question.

The third case is The Mary.[2] In that case certain goods had been landed at a port of necessity, and were afterwards destroyed by fire. The evidence was that they were so much damaged that they must have been landed in any event; and also that the examination of the ship would have required them to be landed. Judge Sprague held that the value of the burned goods was not to be brought into the adjustment. No question was made about the extraordinary expense of the unlading itself, and no doubt the adjusters charged this to general average. The decision simply was that the loss could not be considered to have been voluntarily incurred, as it was one which would have occurred in any event. I do not consider that any question of sole motive was present to the mind of the learned judge. At all events, the case does not support the proposition that if the landing of the goods had conferred some possible benefit on a stranger, but was otherwise a subject for contribution between the parties to the adventure, that contribution would not have been due.

In a case in the House of Lords,[3] where a ship was wrecked on the coast of France, and the shipowner sent an agent from England, who incurred large expenses in landing and dealing with the cargo, partly for the purpose of saving the freight, and partly for

[1] The John Perkins, 3 Ware, 89, and 21 Law Reporter, 87; The James P. Donaldson, 19 Fed. Rep. 264. The decision in this case is by Brown, J., who gives the dissenting opinion in Ralli *v.* Troup.

[2] 1 Sprague, 17.

[3] Rose *v.* Bank of Australasia (1894), A. C. 687.

the general good of ship, freight, and cargo, and the trial judge had charged these expenses to general average, his judgment, which had been reversed by the Court of Appeal, was restored. No question of sole motive was raised in either court.

Considering the underlying principle of general average, which is that he who receives the benefit should share the burden, and that this has been applied to many cases where neither the master nor any one connected with the command of the adventure has ordered the sacrifice, as in the instances of captors, passengers, seamen, money awarded for a recapture, and for saving a derelict, and that even where the master acts, it is often rather as one in authority than as an agent for the owner of the cargo, I cannot but conclude with Mr. Justice Brown that "there is no distinction in principle between a sacrifice made by a master, and one made by authority of law, provided the common safety of the ship and cargo be the object of the action."

J. Lowell.